United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 9, 2005

TO : Joseph P. Norelli, Acting Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 240-3367-1762
506-6001

SUBJECT: California Union of Safety Employees 506-6090
Case 20-CA-32425 524-5017-0100

The Region submitted this case for advice as to whether a union-employer violated the Act by retaliating against certain of its employees for refusing to sign a letter criticizing their former collective-bargaining representative, where (1) the former representative was seeking to decertify the union-employer in the only bargaining unit it represented, and (2) the union-employer planned to use the letter in its effort to defeat the challenge. We conclude that the Region should dismiss the instant charge, absent withdrawal. Even assuming, arguendo, that the conduct of the employees at issue was protected by Section 7 of the Act, the Employer's legitimate business justification outweighed the exercise of the employees' protected activities.

FACTS

California Union of Safety Employees (the Employer or CAUSE) is a labor organization that represents about 7,000 security officers employed by the State of California (Unit 7). On June 13, 2003, Teamsters Local 228 (Local 228) was certified by the Board to represent a unit comprised of about 12 to 15 professional and clerical employees employed by CAUSE in Northern California.

Beginning in the late Spring of 2004, while it was negotiating for an initial collective-bargaining agreement with CAUSE, Local 228 began an effort to decertify CAUSE and replace it as the collective-bargaining representative of Unit 7. In August 2004, Local 228 issued a notice to CAUSE staff employees assuring them that, if its decertification campaign was successful, Local 228 would offer them employment.

Local 228's actions in this regard resulted in a disqualifying conflict of interest in representing the

employees of CAUSE.[1] By letter dated November 29, 2004, Local 228 disclaimed interest in representing the employees of CAUSE in the certified unit.[2]

Since it disclaimed interest in representing the certified unit of CAUSE staff employees, Local 228 continued its efforts to decertify and replace CAUSE as the bargaining representative of Unit 7. In opposing Local 228's decertification efforts, CAUSE instructed its staff to take steps which it hoped will help thwart the decertification campaign, including convincing Unit 7 members to oppose the decertification effort. CAUSE gave directives to its staff to portray Local 228 in a negative light to Unit 7 members. The Employer contends that some of its staff employees were unwilling to actively oppose the decertification campaign, for fear of losing any future employment positions promised by Local 228 in the event the decertification campaign is successful.

About March 1, 2005,[3] as a part of the Employer's effort to defend against the decertification campaign, CAUSE Chief Legal Counsel Kasey Clark distributed a letter to be signed by all CAUSE staff which expressed opposition to Local 228's decertification efforts and supported CAUSE. The signed letter was to be posted on the CAUSE website for Unit 7 members to read. According to CAUSE, the purpose and intent of the letter was to help CAUSE's efforts opposing the decertification campaign of Local 228. Thus, the Employer argues that Unit 7 members had questioned CAUSE staff about their affiliation with Local 228, that Unit 7 members assumed that CAUSE staff were endorsing and supporting the decertification since they were members of Local 228, and that Local 228 still listed the CAUSE staff on its website as a represented unit.[4]

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[1] See California Union of Safety Employees, et al., Cases 20-CA-32059 and 20-CB-12210, Advice Memorandum dated November 9, 2004.

[2] As a result of a subsequent Board representation proceeding, the clericals of CAUSE are now represented by the Office and Professional Employees Union Local 29 and the professional employees are unrepresented.

[3] All dates hereafter are in 2005.

[4] While it is unclear whether the record supports all the Employer's factual contentions, the Region's investigation did not reveal that the Employer's actions were based upon any traditional proscribed motive, e.g., retaliation against its employees for having selected Local 228 to be their bargaining representative in 2003.

About March 1, CAUSE's Legal Counsel Clark requested that Allie Cowen, a legal secretary in CAUSE's Sacramento office, sign the pro-CAUSE letter. When she asked if she would be fired if she did not sign, Clark replied that he hoped it would not come to that and asked why Cowen did not want to sign the document. Clark accused Cowan of not being loyal to CAUSE and said that she was sticking up for the Teamsters. Cowen signed the document, but also wrote "U.D." for "under duress" below her name. Later, when she went to Clark's office to make a copy of the letter, Cowen saw that Clark had whitened-out the "U.D." she had written. When asked why he had done that, Clark replied that he had not given Cowen permission to write anything else on the document. Cowen then made a copy of the letter and added the phrase "under protest" above her name. Upon seeing the letter with this modification, Casey told Cowen to pack up her personal belongings and leave and to go home "until further notice." That evening, one of CAUSE's attorneys called Cowen and told her that she could return to work if she signed the document again but without any additions. Cowan agreed to do as instructed and returned to work on March 2. On that date, Cowen was given a written reprimand stating, in part, that her conduct had raised serious concerns "as to her loyalty to CAUSE" and that she should not be claiming duress when asked to show support for her Employer.

On March 7, Jim Brantly, the supervising labor representative of CAUSE's Southern California office, asked secretary Marilyn Wood to sign the March 1 letter. In requesting that she sign the document, Brantly told Wood that CAUSE would place the letter on its website to encourage Unit 7 members to support CAUSE and oppose the decertification. Wood took the letter, signed it and wrote "signed under protest" underneath her signature. Brantly asked her why she had written the words "under protest" on the letter and told her that she should not have defaced the letter in that manner. Wood responded that Kasey Clark was trying to force everyone to sign the letter and was acting like "a little Hitler." After conferring with Clark, Brantly instructed Wood to go home and think about what she had done; he said that they would discuss the matter the next day.

When Wood returned to work on March 8, Brantly again asked why she had signed the letter under protest. Wood responded that she did not agree with the contents of the letter, that the letter had not been prepared by her, and that she was being forced to sign the document under threat

of termination. When Brantly asked if she would sign another copy of the letter, Wood declined and was placed on administrative leave.

Wood was then terminated by letter dated March 11. In the letter of termination, CAUSE's Chief Legal Counsel Kasey Clark stated that Wood's refusal to sign a letter supportive of her Employer, particularly at a time in which its very existence was being threatened, constituted a breach of her duty of loyalty and was a terminable offense, in and of itself. The letter continued by referring to prior incidents of disloyalty in 2002 and in 2004 and concluded that referring to a manager as Hitler "is beyond the bounds of tolerable workplace behavior."

On about June 15, Local 228 served CAUSE with a decertification petition that was being concurrently filed with the California Public Employees Relations Board. It appears that this proceeding is still pending before the state agency.

In late June, the state of California Employment Development Department sustained employee Wood's right to unemployment compensation. The state ALJ ruled that Wood was exercising her First Amendment rights to not sign the March 1 letter and these rights were not outweighed by any Employer interests. The ALJ stated that the Employer could have left Wood's name off of the March 1 letter without any substantial damage to the Employer's efforts. Wood's conduct was thus not a willful or wanton disregard of the Employer's interests amounting to misconduct.[5]

ACTION

We conclude that even assuming that both employees Cowen and Wood were engaged in protected union activity by their refusal to sign the March 1 pro-CAUSE letter, their Section 7 rights were outweighed by very substantial and legitimate Employer business interests. Thus, their discipline did not violate the Act and the instant charge should be dismissed, absent withdrawal.

We assume, without deciding, that the conduct of employees Cowen and Wood in refusing to sign without reservations the March 1 letter constituted protected union activity. Since both employees did not wish to publicly criticize Local 228, their former Section 9(a) representative, and/or wished to refrain from taking any

[5] Case No. 1574267, Orange County Office of Appeals, ALJ J.H. Stewart.

public part in a dispute involving Local 228, this conduct was arguably prima facie protected union activity. Thus, Section 8(a)(3) broadly protects employees from employer discrimination in employment based upon legitimate attributes of employee union membership, activities or residual support.[6]

Further, as a general matter, "an employer may not condition. . . continued employment, on the waiver of statutory rights."[7] This principle would apply to unions that act as employers.[8] Thus, Section 8(a)(3) could protect employees Cowen and Wood in the exercise of their arguably protected union activity of not publicly criticizing their former bargaining representative, unless the Employer possessed a countervailing, legitimate business justification for its insistence that they waive this asserted right.[9]

When a union acts as an employer and, on the grounds of disloyalty, takes adverse action against its own

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[6] See generally Radio Officers' Union v. NLRB, 347 U.S. 17, 39-40 (1954)(8(a)(3) proscribes employer retaliation for employee's union activities).

[7] Resco Products, Inc., 331 NLRB 1546, 1550 (2000) (successor employer's right to set initial terms of employment did not include right to require, as an employment condition, that employees give up accrued contractual rights, or other rights protected by the Act, against the predecessor employer).

[8] See Office Employees International Union v. NLRB, 353 U.S. 313, 316 (1957) ("when a labor union takes on the role of an employer the Act applies to its operations just as it would any other employer"); Retail Clerks Local 428 (Rose C. Wong), 163 NLRB 431, 432-33 (1967) (union-employer may, but did not in this case, lawfully require its employees to be members of union, thereby insisting as an employment condition that they waive their rights to refrain from joining a particular union, only so long as it makes clear that membership obligations are imposed only as being a necessary part of the employees' jobs, that the union-employer is not their bargaining representative, that employees are free to join another union to exercise their statutory rights, and that the majority of them choose another union to represent them, the union-employer will bargain with it, upon request).

[9] Cf. Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945).

employees who are allegedly engaged in Section 7 activities, the Board has recently relied on the analysis of Eastex and Republic Aviation and engaged in a similar balancing test to determine whether the union-employer acted unlawfully.[10] The Board weighs the "right to engage in this [Section 7] activity against the legitimacy of the employer interest at stake."[11] The analysis of the Board majority in Operating Engineers Local 370 does not involve the narrow question of whether an employee has engaged in conduct which actually loses the Act's protection, but rather of whether the union-employer, based on principles of loyalty and teamwork, is privileged to require its employees to waive certain Section 7 rights. The Board majority in Operating Engineers Local 370 found no violation because the employer's legitimate business interests clearly outweighed the arguable Section 7 right being exercised ("mutual aid or protection" of apprentices the employer represented). In this regard, the employee directed his efforts in support of the apprentices not at their employers, but at their bargaining representative which was his employer. See 341 NLRB No. 114, sl. op. at 4.[12]

The balancing test set forth in Operating Engineers Local 370 was applied in Service Employees, Local 1, 344 NLRB No. 135 (2005). In Service Employees, Local 1 the Board found illegal the union-employer's discharge of a paid union business representative, who had engaged in in-house discussions with co-workers about union policies governing the duties of business representatives. Those policies directly affected their working conditions. The Board distinguished the result in Operating Engineers Local 370 on the basis that the arguable Section 7 right there was weak, in that it had no impact on the employee's and his co-workers' working conditions. In contrast, in Service Employees, Local 1, the Board found that the Section 7 interest at issue, the protection of the employee's and his colleagues' working conditions, was

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[10] See Operating Engineers Local 370, 341 NLRB No. 114 (2004), sl. op. at 3 (union as employer was privileged to discharge paid union organizer who publicly criticized official union policy toward employees it represented).

[11] Id., sl. op. at 3.

[12] Board Member Schaumber concurred in the result reached in Operating Engineers Local 370. He would have adopted in substantial part the ALJ's rationale to hold the union organizer's actions as unprotected disloyalty. See 341 NLRB No. 114, sl. op. at 1, n.2 and 9.

"strong" and was not outweighed by the union's legitimate interest in the cooperation of its employees with its policies. See sl. op. at 3.

We conclude that the balancing test of Operating Engineers Local 370 and Service Employees, Local 1 applies to this case. We see no meaningful difference between the affirmative conduct initiated by the employees in those cases and the employees' failure to sign the March 1 letter in response to an Employer directive herein.[13] In both these circumstances, the Board must evaluate the relative strength of the asserted Section 7 right and weigh against it the employer claim of a substantial, legitimate business justification.

In this case the arguable Section 7 right must be viewed as relatively weak. At best, employees Cowen and Wood were exercising residual loyalty to Local 228, their former Section 9(a) representative. At the time of their conduct, however, they were represented for collective-bargaining purposes by another labor organization. Further, their conduct had no immediate or foreseeable impact on their terms or conditions of employment.

In contrast, CAUSE had a very substantial, legitimate business justification for its conduct. This Employer was involved in a decertification campaign with Local 228 to represent the only bargaining unit it represented. CAUSE asserted that its rival union was using the former representation of its employees in the campaign, and it wanted the March 1 letter to correct any distortions created by Local 228. There is no evidence that CAUSE's demand that all its clericals sign the March 1 letter was prompted by any proscribed motive to interfere with any typical employee Section 7 activity.[14]

In these circumstances, the Employer's strong, legitimate business justification clearly outweighed the relatively weak, arguable Section 7 union activity engaged

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[13] Cf. Shoppers Drug Mart, Inc., 226 NLRB 901 (1976) (concerted refusal of employees to submit to employer's otherwise lawful polygraph examination held to be unprotected activity).

[14] Compare National Food Service, Inc., 196 NLRB 295 (1972) (unlawful for employer to schedule polygraph examination and discharge employees for refusing to submit to exam where purpose was to interfere with union activities).

in by employees Cowen and Wood. Thus, the discipline imposed by the Employer did not violate the Act.[15]

The Region should therefore dismiss the instant charge, absent withdrawal.

B.J.K.

[15] See Operating Engineers Local 370, supra.

As Wood's state unemployment proceeding was enforcing a separate statutory scheme, the result reached therein is not binding upon the Board. See, e.g., Magic Pan, Inc., 242 NLRB 840, 841 (1979); Terraillon Corp., 280 NLRB 366, 372, n.9 (1986) and the cases cited therein.